MEETING RECORD

NAME OF GROUP:	PLANNING COMMISSION
DATE, TIME AND PLACE OF MEETING:	Wednesday, July 6, 2005, 1:00 p.m., City Council Chambers, First Floor, County-City Building, 555 S. 10th Street, Lincoln, Nebraska
MEMBERS IN ATTENDANCE:	Jon Carlson, Gene Carroll, Dick Esseks, Roger Larson, and Mary Bills-Strand (Gerry Krieser, Melinda Pearson, Lynn Sunderman and Tommy Taylor absent). Marvin Krout, Ray Hill, Brian Will, Tom Cajka, Greg Czaplewski, Jean Walker and Teresa McKinstry of the Planning Department; media and other interested citizens.
STATED PURPOSE OF MEETING:	Regular Planning Commission Meeting

Chair Mary Bills-Strand called the meeting to order and requested a motion approving the minutes for the regular meeting held June 22, 2005. Motion for approval made by Carroll, seconded by Larson and carried 5-0: Carlson, Carroll, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent.

CONSENT AGENDA
PUBLIC HEARING & ADMINISTRATIVE ACTION
BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carlson, Carroll, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

The Consent Agenda consisted of the following items: **CHANGE OF ZONE NO. 05044; CHANGE OF ZONE NO. 05046; CHANGE OF ZONE NO. 05047; and STREET AND ALLEY VACATION NO. 05005.**

Item No. 1.1, Change of Zone No. 05044, and Item No. 1.2, Change of Zone No. 05046, were removed from the Consent Agenda and scheduled for separate public hearing.

Ex Parte Communications: None.

Carroll moved to approve the remaining Consent Agenda, seconded by Larson and carried 5-0: Carlson, Carroll, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent.

CHANGE OF ZONE NO. 05044
FROM B-3 COMMERCIAL DISTRICT
TO R-4 RESIDENTIAL DISTRICT,
ON PROPERTY GENERALLY LOCATED
ALONG N. 47TH STREET BETWEEN
CLEVELAND AND BALDWIN AVENUES.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Staff recommendation: Approval

Ex Parte Communications: None.

This application was removed from the Consent Agenda due to a letter received in opposition.

Greg Czaplewski of Planning staff submitted two letters in support, including signed petitions from 10 property owners; and a letter in opposition from Martin and Judy Shields, 4643 Madison Avenue, asking that their property remain zoned B-3 and be removed from this change of zone.

Proponents

1, Wynn Hjermstad, Urban Development, testified as the applicant. She advised that this area was originally part of another downzone application that came forward back in April as a result of the University Place Revitalization & Traffic Study done last year. That study did a careful analysis of all existing land uses and this was one area recommended to be rezoned from B-3 to R-4. Just before that application reached the City Council, the University Place Business Association expressed some concerns that they were not sure the people who lived in this area were aware of what was being proposed. The University Place Neighborhood Association withdrew that portion of the application and held another meeting to make sure that everyone was contacted. There was very good attendance and just about everyone who lived in the area attended. She indicated that there was unanimous consensus to proceed with this downzone.

Bills-Strand pointed out that it is not unanimous due to the letter in opposition from the Shields.

2. Larry Zink, 4926 Leighton Avenue, immediate past president and member of board of the University Place Community Organization (UPCO), spoke on behalf of UPCO in support of this change of zone in the University Place neighborhood along the west side of 47th Street. The properties are currently in residential use and this change would make the zoning

consistent with the historical residential use of these properties. The year-long study resulted in a comprehensive set of recommendations that came before this Commission and those recommendations were adopted as an amendment to the Comprehensive Plan, and this rezoning was part of those recommendations. UPCO originally came to this body with proposed rezoning of about 220 properties, including this area. The Commission recommended approval and forwarded it on to the City Council. In between that time and the public hearing before the City Council, concerns were raised when some of the members of the business community were not aware of this particular proposed change of zone. Consistent with the collaborative process taken in this planning process, UPCO requested that these properties be withdrawn from that earlier application and UPCO hosted a couple of meetings of business owners, property owners and city staff to look at the implications to make sure the property owners are in support. Those property owners who attended the meeting were in support of the change of zone, including the business owners on the implementation committee.

Zink stated that UPCO has bent over backwards trying to involve people in this process. Up until today, this was the first time that he was aware of anyone who was opposed to this change. The proposed rezoning would make the current zoning consistent with the current use of the properties and has overwhelming support of the property owners in the area.

Bills-Strand inquired whether there are any home offices working out of those residential uses. Zink was not aware of any.

Carroll requested to see the 10 out of 19 property owners who submitted petitions in support shown on the map. Zink did not have a map, but suggested that they are spread out throughout the area. Carroll noted that there is a property on the corner pf N.W. 47th & Baldwin that is not included in the change of zone request. Zink explained that that property was excluded because it is commercial on the lower level with residential on the top level.

3. Tom Moloney, 4635 Cleveland Avenue, testified in support. The neighbors and the private property owners were aware of the rezoning, regardless of whether there were signs posted or not. Mr. Zink has provided ample information about the zoning with detailed explanations. In addition, Urban Development has provided an excellent continuous stream of information and has been willing to explain the impacts. He contacted members of the University Place Business Association, and the officers stated that their organization had formally taken a position to neither support nor oppose this change. Moloney has lived in the area since 1980. At that time, the continuum of the zoning stream was that he lived in an I zoned area for light industry. There have been many, many changes in the University Place area, particularly in the commercial district. His concern has been a slow, almost undetectable, process of the continuous evaporation of housing stock. Within his 4 block area since 1980, three homes have been demolished to build apartment buildings and the school was demolished and removed three homes along 48th Street. The evaporation of residential

dwellings in the University Place area from 64th to 33rd, from Adams to Leighton, has been upwards to 10%. Houses have been torn down and slip-ins have been constructed. There are people with excess amounts of capital on the east and west coast that are coming in and purchasing homes which they then convert or retain their use as apartment dwellings, all resulting in less housing stock being available. Where will people live and where will poor people live when there are no more houses?

There was no testimony in opposition

Staff questions

Carlson asked staff about the property in opposition. Greg Czaplewski of Planning staff showed the property on the map. The issue that property faces is that the house is currently being rented out as residential and the garage is being rented out as commercial property. The property was sold recently and Czaplewski has told the new owner that there may be a violation of the zoning ordinance with two primary uses like that on one property. The owner is trying to make a decision as to the future of the property and that is why he is asking that the property remain B-3 – because he sees a commercial use of that property in the future.

From previous downzoning, Esseks wondered whether there is any evidence of the effectiveness of this step to protect/enhance the stability of the neighborhood and health of the neighborhood. Czaplewski believes that some of the neighborhoods have seen success in encouraging de-conversion back to single family and stabilization of home ownership. The Planning Commission does have a "downzoning subcommittee" that has been formed and has been meeting recently to work on the downzoning issues.

When downzoning areas like this, Larson wondered whether the properties that are not in conformance because of the downzone are grandfathered in. Czaplewski advised that if it is a legally conforming use and does not violate any ordinances, then it could continue as a legal nonconforming use after the downzone.

Bills-Strand inquired whether there would be a difference between what would be conforming in B-3 versus R-4. Czaplewski advised that R-4 does not allow any commercial uses. In the case of the property in opposition, if Building & Safety determines that the use is legal today, the downzone would not cause the owner to have to make any changes. If the use is determined not to be legal, then the owner would not be able to keep the commercial use under either zoning.

Esseks understands that the issue is dual usage. If it were one or the other, would it be grandfathered in? Czaplewski stated that if it is a residential use, it would be fine. If it is a legal commercial use, then it would be grandfathered.

Larson does not believe this action will affect that property. It is going to be determined whether it is legal or illegal now. Czaplewski stated that if it is illegal now, he will have to change anyway.

ACTION BY PLANNING COMMISSION: July 6, 2005

Esseks moved approval, seconded by Carlson.

Bills-Strand commented that she does not like downzoning. She is hopeful that the work of the Planning Commission subcommittee will find alternatives because there are some negative effects of downzoning.

Motion for approval carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent. This is a recommendation to the City Council.

CHANGE OF ZONE NO. 05046,
TEXT AMENDMENT TO TITLE 27
TO PROVIDE ADDITIONAL CIRCUMSTANCES
UNDER WHICH FENCES MAY BE ERECTED TO A HEIGHT
IN EXCESS OF SEVENTY-SIX INCHES.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Staff recommendation: Approval

Ex Parte Communications: None.

This application was removed from the Consent Agenda by the staff.

Tom Cajka of Planning staff made changes to paragraphs (4) and (5) below for clarification:

(1) The fence is located in the required front yard abutting a major street, and
   (~~a~~ I) The lot or premises has double street frontage and abuts a major street;
   (~~b~~ ii) Vehicular access to the lot or premises is not from the major street; and
   ~~c~~ iii) The fence shall be parallel to the major street.
(2) The fence is located within any commercial or industrial district,
(3) The fence is located on a common lot line between a residentially zoned district and a

commercially or industrially zoned district, or

(4) The fence is located in the rear or side yard of a residentially zoned district, or ~~and~~

(5) The fence is located within the front yard area connecting to a fence located in the required front yard abutting a major street pursuant to section (1) above,

provided that no fence over seventy-six inches shall be located within four feet from any main structure.

Proponents

1. Mark Hunzeker appeared on behalf of **Hampton Development Services,** which has a new company in the fence business. The reason that they have requested this text amendment is due to the desire of many commercial and industrial customers, and residential customers that abut commercial or industrial areas, to use a larger fence as a screen between different uses. The purpose is to allow for certain circumstances where you have use an 8' fence instead of a 6' fence. Hunzeker agreed with the staff's amendment; however, he also proposed an amendment to the "Measurement" provision to allow that, "Ornamental features on the top of fence posts up to six inches in height shall not be considered part of the fence." The fences that Hampton Development builds are concrete, made with concrete pillars and panels which appear to be stone, and they are stained to look like stone. They put a concrete cap on top of the pillar, and this is interpreted to be part of the fence. Hunzeker's proposed amendment would define ornamental caps and the like as not being part of the fence if they are less than six inches tall as an extension of the post. He wants to make it clear that we are providing for decorative caps that are generally proportionate to the height and width of the post. We are not intending to allow for extensions which span between the posts, or disproportionate to the posts, or which have the effect to increase the overall height of the fence.

Larson understands that there would not be any fences allowed between residential lots. Hunzeker explained that fences are permitted between residential lots. If the 8' fence were an extension of a permitted 8' fence along an arterial street, it would be allowed to extend between the houses, but would have to be a minimum of 4' from either main structure. If you have less than 10' between the buildings, you would not be able to extend a fence that is taller than 6' 4".

Esseks observed that the existing language provides for a rather liberal vertical standard to 12 feet. Hunzeker explained that this applies in the situation where you have a lot which is below the grade of the existing street. In that situation, you can have a fence that may extend above the grade of the street but it cannot be more than 12' from the ground. The caps would just be on top of the post. Esseks inquired whether the posts would be so close together to

be a major obstruction. Hunzeker suggested that most people put them as far apart as they can. He does not know whether there is a standard. The ones built by his client are at least eight feet apart. A standard panel at a lumber yard is an 8' panel.

There was no testimony in opposition.

Staff questions

Carroll asked for staff's reaction to Hunzeker's proposed amendment. Cajka indicated that staff is in agreement.

Carroll inquired whether ornamental tops are currently allowed in the fence code. Cajka believes that Building & Safety counts everything within the height of the fence, including lattice work, etc. Under this provision, up to six inches would not be counted. The top for posts is not included in the code today.

Larson has some concern about an 8' fence between residential lots. Cajka clarified that the 8' fence would commonly be known as the back yard, but for zoning purposes, it is considered the front yard along a major street. It can also be included between two residential houses on the side yard. It does not necessarily have to go all the way to the major street. The fence between the residences has to be 4' away from the main structure. The 8' fence could also be between main structures even if there was not a major street, as long as it is 4' away from the house or structure. Larson does not like this provision.

Carlson wondered about simply changing the height from 96 inches to 100 or 102 inches to give flexibility for the decorative caps or top. Cajka advised that there had been some discussion about allowing the entire fence to be up to 8' 6". He believes staff would be amenable either way.

Carlson understands that an 8' fence is currently allowed if it is inspected to make sure it is constructed properly. Cajka advised that any fence above 6'4" must have a building permit from Building & Safety. If the fence is of combustible materials and over 6' 4", it has to be set back on the lot line two feet.

Response by the Applicant

Hunzeker agreed that changing the height from 96 inches to 102 inches is acceptable and, as far as Building & Safety is concerned, that would probably be their preference. His amendment was drafted in response to a specific question about the ornamental caps. There is an additional 4" of slack in the 6' fence that allows you to put it off the ground or whatever. Hunzeker believes there is both the merit of simplicity and consistency in saying 102 inches across the board, and he would not object.

ACTION BY PLANNING COMMISSION: July 6, 2005

Carlson moved approval, including the amendment by staff submitted today, seconded by Carroll.

Carlson believes the amendment is fairly consistent. The only significant change is the ability to put the fence on the lot line if taller than six feet instead of having to move it back two feet. It becomes a maintenance issue. He does not believe there will be much of an aesthetic difference.

Carlson made a motion to amend the overall restriction from 96 inches to 102 inches, with no reference to the caps, seconded by Esseks.

Carlson noted that his intent is that the 102 inches would include the height of the cap.

Motion to amend carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent

Main motion, as amended, carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent. This is a recommendation to the City Council.

SPECIAL PERMIT NO. 05032
TO EXPAND A NON-CONFORMING USE
FOR THE CONSUMPTION OF ALCOHOL
ON THE PREMISES GENERALLY LOCATED
AT SOUTH 70TH AND "A" STREETS.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Staff recommendation: Conditional approval.

Ex Parte Communications: None.

Brian Will of Planning staff submitted two letters and a petition in opposition. He also submitted revised conditions of approval provided by staff based on comments from the Health Department, including an additional Condition #2.1.2: No outside sound amplification equipment, musical instruments, radios, TV sets (except where sound is mute), or similar devices be permitted in the beer garden. The comments from the Health Department were also submitted.

Proponents

1. Cindy Swanson, owner of The Library Lounge, at 70th & A Streets, testified as the applicant. She has applied for this special permit because of the recent smoking ban. Her business has deteriorated by 40% overall from the smoking ban. Her customers are currently going out on the west side of the premises, which abuts the residential area, to smoke and it probably is noisy in the evenings for the residents. She wants to put the beer garden in so that the noise is forced to the south, alleviating a lot of the noise on the west side. She needs this special permit in order to stay in business. She does not serve food and her customers want to smoke when they drink. She has had conversations with Mr. Cottrell, who has submitted a letter in opposition. She has kept her doors closed on Thursday, Friday and Saturday when she has Karaoke; however, this requires her to keep her air conditioner running in the spring and fall. She has tried to cooperate as much as possible. The bar has been in existence for 37 years. It was there before the houses were built. This is her livelihood. She does not know what else to do to counteract the smoking ban.

Larson confirmed that it is now illegal for the patrons to take their drinks outside with them to smoke. Swanson concurred.

Opposition

1. Paul Berggren, 7420 Lambert Place, read a statement into the record from Mr. Cottrell, who owns three properties along Kingston across the alley from the Library Lounge. Cottrell has lived on Kingston for 20 years and viewed The Library Lounge as a quiet neighbor that served food and beverages. Over the years, it has evolved into a cocktail lounge with liquor sales, live music and younger audiences, with an increasingly amount of traffic and customer noise until 2:00 a.m. The human context of the request is important. The Library Lounge is already nonconforming for the sale of on-site alcohol by the separation from residential property. The current distance is 64' and 90' from the bar doors to the residential property, which already makes the relationship between the bar and family dwellings a challenge. This type of establishment would not be allowed if of new construction today.

Cottrell disagrees with the staff analysis. The neighbors will have to endure increased traffic congestion, increased traffic noise in the alley and bar area and increased customer noise outside the bar. This is a quality of life issue. To allow the addition of a beer garden that serves alcohol would ignore the obvious fact that it is already nonconforming and would be made worse by the proposed expansion. The owner of the lounge supplied pictures of the proposed expansion but the photos submitted by the opposition supply the missing perspective. It is already an inappropriate proximity and will be made worse by this proposal. This proposal will have a negative impact on the family dwellings in the immediate area and their quality of life.

The proposed beer garden will be 64' from the residence on Rexford Drive. Even though the west side of the lounge may be abated by putting the beer garden to the south, it would still have an exposure to the immediate neighbors.

2. Norman Otto, 1500 Kingston Road, which is directly across the street, testified in opposition. His bedroom window is to the north and at 2:00 a.m. he is awakened with traffic that is still in the bar area. If the expansion is allowed, he suggested that the proper thing to do would be to acquire the empty space directly east of the bar into the shopping area instead of getting closer to the residential area.

3. Jim Otto, 6903 Rexford Drive, testified in opposition; however, he stated that he empathizes with both sides. He would rather not have the lounge expand, but the also agrees that the logical thing would be to expand to the east with most of the noise going out to 70th Street. In fairness to the Library Lounge, Otto agreed that the owner has tried to cooperate with the neighborhood, but there has been much more noise since the smoking ban because people are forced to walk outside to have a cigarette. This special permit is going to increase that activity because they will be able to carry their drink outside. Otto suggested that the Planning Department is supporting the expansion to the south because it is an alleviation to the nonconforming use. It may help based on the letter of the law, but it may make things worse based on the intent of the law. If you put it on the south side, you are simply asking for confrontation. If it is on the east side, it would mean that everyone is trying to get along. He measured the distance from where it is proposed to go to the actual curb. It is approximately 52' if located on the south. It would be more than 100' if located on the east side.

Staff questions

Carroll noted that there is a 6' sidewalk on the south side. Is it best to come out of the building and going to the enclosed area on that sidewalk? Brian Will of Planning staff advised that the applicant has been told that if they move the parking spaces, the sidewalk will have to be re-routed but should remain. The enclosure will go right up to the building.

Carlson suggested that they could build a structure for the smoking area without a special permit if alcohol were not permitted to be taken outside. Building & Safety would need to issue a building permit. This is a request to allow the patrons to take the alcohol outside.

With regard to building to the east, Will advised that the staff did suggest that alternative to the applicant in the review process. The applicant or owner were not agreeable to that alternative.

Carroll wondered whether the loss of the parking stalls is a problem. Will stated that the ordinance requires a certain amount of parking. Building & Safety tracks the uses and floor area and amount of parking required. There is excess parking based upon the uses of the center at this time and they can remove the parking spaces.

Response by the Applicant

Swanson stated that the reason the beer garden was not designed to be on the east side of the building is because the shopping center owner is not interested in locating it there. If it were on the east side, it would be in the middle of the joint parking lot in the middle of the complex. As far as the noise, she believes the noise will be cut down with it being on the south. Without any music or radio, etc., there will not be bands or anything else to make it noisier. At least with the enclosure, the patrons are controlled and the fence will help alleviate some of the noise and debris problems.

Swanson confirmed that she has been the owner for eight years at this location, but the bar has been there for 36 years. The houses came after the bar so that it why it is grandfathered.

ACTION BY PLANNING COMMISSION: July 6, 2005

Carlson moved to deny, seconded by Larson.

Carlson does not believe this is a smoking issue. If people wander outside to have a cigarette, the applicant could control that by having this same size structure for smoking and not drinking. This is about whether we want to change the rule to let people go outside with their alcohol. He agrees that this is a nonconforming use. The use of the building seems to have evolved over time. The question is not whether it is nonconforming and should be here – it is already there. The question is whether we want to expand it and now have alcohol outside. He does not think it is right to create an additional opportunity to go outside with the drink and stay outside.

Esseks commented that he is sympathetic to the owner because of the smoking ban. To him a reasonable compromise is to put the beer garden to the east. It is upsetting that the landlord does not see that and he is hoping that if this is denied, the landlord will see that and find it necessary to keep the valuable patron by allowing the expansion to the east.

Bills-Strand agreed with Esseks.

Motion to deny carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman, and Taylor absent. This is final action, unless appealed to the City Council.

(Editorial note: The applicant filed a letter of appeal with the City Clerk on July 6, 2005, and the public hearing before the City Council is tentatively scheduled for Monday, July 25, 2005, at 5:30 p.m.)

WAIVER NO. 05007
TO WAIVE SIDEWALK REQUIREMENTS
IN THE CROSSBRIDGE 1ST ADDITION
PRELIMINARY PLAT ON PROPERTY
GENERALLY LOCATED AT
NORTH 27TH STREET AND FLETCHER AVENUE.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Staff recommendation: Denial.

Ex Parte Communications: None.

Proponents

1. Mark Hunzeker appeared on behalf of **Home Real Estate,** the subdivider of this property. He demonstrated on the map the reasons for this waiver request. There is a very significant grade problem that has given rise to the request to waive the sidewalk. They were able to purchase an additional 50' of land after the approval of the plat, which allowed them to bring Crossbridge directly from 27th Street east and west with parking on both sides. There is a retaining wall along the entire south boundary of the property. There is not room to place a sidewalk on the south side of that parking lot. The developer has proposed an alternative sidewalk location that runs from 27th Street all the way to the east end of Lot 3, over to the south side of the building of Lot 2 and onto the west side of the building of Lot 1. The aerial photo shows that there are no neighbors to the east and there is no place for anybody to go by sidewalk from 27th Street any further east than the church. The church is already there. The area to the north and east is a channel which would require construction of a bridge in order to provide the staff's proposed alternative sidewalk to the northeast.

Hunzeker believes that the suggestion by staff that they would be open to approving the waiver if the developer provides a sidewalk connection to the apartments to the northeast, illustrates the fact that there is no need for a sidewalk on the south side of this private roadway. This is a church that is one of the very, very few in this part of the city that has grown to 400 members over the past five years. The pedestrian access is not going to help that much.

Hunzeker pointed out that this is a design standard issue and there is a provision for waiving the design standards. Hunzeker believes that this is a circumstance which justifies the waiver of this sidewalk.

Hunzeker advised that there is a commercial use to the north.

Carroll inquired whether there is a reason not to go to the northeast area – is it because you have to cross the bridge? Hunzeker does not believe they are providing better access by putting a sidewalk on the south side of this road. The requirement in this case does not lend itself to practical application. Carroll thinks there needs to be connectivity. Hunzeker suggested that the only connection that they would have for sidewalk on the south side of the road would be to 27th Street, and there is a connection to 27th that serves all three lots. Bills-Strand observed that if the sidewalk runs along the south, it just ends at the east side of the church. Hunzeker does not believe it would even go to the east side of the church. It would go to the east side of the parking lot. Bills-Strand noted that there is vacant land that is zoned R-3 to the east, so if the sidewalk were constructed all along the north and came back down on the east to connect with the church's sidewalk, that would fulfill that connectivity need and the potential R-3 zoning to the east.

Staff questions

Esseks asked staff to respond to the applicant's proposal to build an elaborate sidewalk from 27th over to the church. Greg Czaplewski of Planning staff stated that the sidewalk around Outlot B is required by design standards. The sidewalk they are asking to waive is also a design standard. The staff position is that the sidewalk they are proposing to build is required. Czaplewski pointed out that the property across 27th to the west is all residential zoning and it is certainly possible that there may be some pedestrians coming from the west to the church. The apartments are located to the northeast and may benefit from a pedestrian connection. Some of the area has been filled in and it is the staff's position that the sidewalk is a requirement of the design standards and it would have been possible to purchase a few more feet for a sidewalk. The staff report does suggest that the sidewalk won't fit, but that is because of the design of the private roadway and the parking stalls. It could have been designed a different way.

Response by the Applicant

With regard to the grade issue, Hunzeker stated that the developer is not necessarily opposed to the concept of making a connection over to the apartment complex; however, they are requesting not to be required to do that because at this point they do not know whether it is going to be feasible. The grade differential is about 18', so there is a pretty significant slope and a channel to get across and they are not sure whether they will be able to get permission to do that at a cost that is going to be feasible. The retaining wall on the south side is a constraint; some distance from the property line must be maintained for the construction of that wall and maybe the sidewalk could be run along the top of the wall. If there was more land available to purchase, it would have been purchased. This site has been improved

considerably by acquisition of the additional 50', but the ability to provide that sidewalk is not practical in this circumstance and that is the reason for the waiver provision in the ordinance. This is an appropriate waiver, and this is a circumstance where the standard really is almost physically impossible to apply.

ACTION BY PLANNING COMMISSION: July 6, 2005

Larson made a motion to approve the waiver request, seconded by Bills-Strand.

Bills-Strand pointed out that the sidewalk does not border along a public street. It is a private roadway. It is a small pocket of commercial uses for a church, for Young Life and some other potential commercial use, which in all likelihood would not be a restaurant. She believes the people that need to get there will drive there and walk through the parking lot. She does not see people using sidewalks in parking lots. She does not think it is necessary in this situation.

Larson agreed.

Carroll commented that he understands the grade differential, but he believes that some of the problem was created by the developer's design and they could have allowed for the sidewalk in their design to make it fit. On the one hand they designed it this way and caused the problem, but on the other hand they are trying to do the best they can with the land they have.

Carlson agrees that some of the problem is potentially self-created, but the question is whether the sidewalk serves a useful pedestrian function. He does not believe that the sidewalk is going to serve an overwhelming function. Moving to the northeast is pretty compelling. This is a preliminary plat so it becomes difficult to ask for additional connections, but since they are asking for a waiver it opens the door to find some circulation; however, he does not see the sidewalk necessarily serving too critical of a purpose. A sidewalk to the northeast would serve a much bigger purpose.

Esseks is worried about the precedent. He believes there needs to be a really good argument to waive a design standard.

Motion to approve the waiver request carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent. This is a recommendation to the City Council.

MISCELLANEOUS NO. 05012,
A REQUEST FOR "REASONABLE ACCOMMODATION"
UNDER TITLE 1 OF THE LINCOLN MUNICIPAL CODE
ON PROPERTY LOCATED AT
4000 LINDSEY CIRCLE.
PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Ex Parte Communications: None.

Proponents

(Testimony verbatim)

1. Scott Moore, 1500 Woodmen Tower, Omaha, Nebraska, attorney, testified on behalf of the applicant, **Developmental Services of Nebraska:** It is my understanding that this is the first request for "reasonable accommodation" that this Board has heard under the relatively new provisions of the Lincoln Municipal Code. Having said that, I want to take some time for this Commission to understand what we are requesting and what the federal law requirements, in addition to what the Lincoln Municipal Code requires.

Development Services of Nebraska, Inc. (hereinafter "DSN") provides residential community treatment to persons with developmental disabilities. These persons are persons with disabilities under three relevant federal statutes: the Fair Housing Act, the Americans With Disabilities Act, and Section 504 of the Rehabilitation Act of 1973, all of which are applicable to the city. Because these residents are covered by these acts, this municipality has an affirmative duty to provide a "reasonable accommodation" where the circumstances require the same. It is a two-step process: Is this requested accommodation – may this accommodation be necessary for persons with disabilities to use and enjoy their particular dwelling? And, if so, the accommodation is appropriate unless it imposes some sort of undue burden on the city, and we want to talk about both of those issues today so you all understand both the necessity from the standpoint of why we are seeking this accommodation, and moreover, why we don't believe that there is any burden on the city in granting the same.

As I said, DSN provides residential treatment for persons with developmental disabilities. There is a tremendous need in this community as well as all communities in the State of Nebraska, for this type of treatment. Scott LeFevre, the Chief Executive Officer of DSN, will speak after me regarding the necessity and explain to you why we're seeking an accommodation, but specifically, the City of Lincoln has an ordinance which prohibits two

group homes, having four or more unrelated persons living in them, to locate within ½ mile of each other. This provision only applies to group homes. There is no other separation requirement in the Lincoln Municipal Code – only to group homes.

This particular home on Lindsey Circle, for which we are here today, has been operating with three persons with developmental disabilities. Because they have three persons, they are considered a "family" under the Lincoln Municipal Code, and now that DSN needs to add one more person with a developmental disability, it changes from a "family" to a "group home" designation and thus the half-mile separation requirement comes into play. That's the specific municipal provision, that is the separation requirement. We are here today requesting an accommodation from that separation requirement – that you allow DSN to operate with four persons with developmental disabilities in this home, despite the separation requirement

Speaking generally on the need for this before Scott goes into the details, there is a tremendous amount of empirical evidence as well a case law out there dealing with reasonable accommodation showing that residential treatment for persons with disabilities such as developmental disabilities is far superior to institutionalizing these folks. They have the ability to learn to cope, advance in their treatment, advance in their integration into the community if they are allowed to live in a residential setting. Having said that, Scott will talk about the details on the necessity.

Switching to the second half, i.e., is there an undue burden on the city if the city grants the accommodation? We have seen no evidence of any sort of undue burden. The home will not change. It will look the same. It will operate the same. It will simply add one more person to this home. Indeed, this is a single family neighborhood and DSN operates its programs, or these people are in a setting that acts as a family, very analogous to a family–eating together, living together, and so on. In fact, that sort of family environment helps them in their treatment for their disabilities. So indeed, when you are talking about land use (and I realize you don't want the proverbial putting a pig in a parlor rather than a barn yard), we're not seeking to construct some multi-family development in the middle of a single family neighborhood. We are not seeking to put in a commercial development in the middle of a single family neighborhood. We are seeking to use this home, which is a single family home, for community based treatment in the same way a family related by adoption, related by blood, related by foster care would be allowed to use it. Indeed, if you are in one of those categories, you can have ten people in the home and that's okay under the Municipal Code. We're seeking to just operate with four folks in this home.

We have a map here that was actually prepared by the City Planning Department which Scott will show you. It will show you the circles of where the separation requirement is applicable. And when you look at that map, I ask you to look at the area – quite frankly, we're running out of space to open up new group homes in this city because of the separation requirement. Many of the other areas where there aren't these circles of prohibition are market rate homes

which are well out of our price range. We don't see any sort of financial or administrative burden. We welcome the city to present some, and we would be more than happy to respond to any burdens that they so speak about.
The only other issue that I have here today is that, in the report of the Planning Department, I note that the Planning Department has not made any recommendation. I am not sure why they haven't made a recommendation and I would ask that they make some sort of recommendation one way or the other to help guide this Commission as they do in other areas. Secondly, on the report, paragraph #7 talks about police calls responded from 2000-2003. I am not sure why that's in here. There is no direction as to why that's in here. That's important for a couple of reasons. Number one, it is incredibly prejudicial to my client to have this in the report. We don't know made the police calls. We don't know if they were legitimate. We don't know if there were any convictions. We don't know if there was any merit to any of these police calls. We haven't been able to review them. I assume you haven't looked at the police calls to see what they're about. So we would ask that this Commission not even consider this because we don't see the relevance and there is nothing to corroborate the legitimacy of police calls nor whether 42 calls is a lot compared to other homes or other operations. Who made the calls? Maybe you have an upset neighbor who doesn't want group homes in the neighborhood and they make calls on a constant basis. There is nothing to substantiate the relevance of police calls related to our request for the accommodation here today. I point that out because we believe it is prejudicial and we believe that this Commission should not consider that in their deliberations today. We will be available for rebuttal. I will answer questions. I will now introduce Scott LeFevre, who is the CEO of DSN.

Bills-Strand: Before you start, Scott, are there any questions of Scott Moore?

Carlson: Just to be clear, and you said it a couple of times, so forgive me for asking again just to make it clear for the record, but one of the accommodations you are asking is because of the spacing requirement for a group home. The four persons would basically move you into the classification of "group home", but specifically, you are asking to just accommodate one additional person, even though a group home would allow up to 16 additional persons. I can ask staff the same question. Are we granting up to 16 or are we granting one additional for four? But your request is for one additional for four.

Moore: Yes, the accommodation process requires an individual assessment. And the individual assessment here is we are seeking to add one person. We need the requisite approval from the State Department of Health & Human Services and so on, on those things, and we will only receive approval for one additional person. If we would seek accommodation in the future to add to that, we would have to come through this process again, and we would do so.

2. Scott LeFevre, 2150 Ridge Line Drive: I am the CEO of DSN and, as Scott had said, we serve individuals with developmental disabilities, mental health needs. We also serve children

who have been dis-enfranchised from their natural homes because of abuse, neglect. We provide residential and day services to approximately 400 people a year in Omaha, Lincoln and Kearney. The individuals with whom we have a relationship generally are those folks who come to us and they ask for services. They freely choose their service provider. The State of Nebraska provides a level of funding for each individual, and that person then goes to various service providers and shops around for what type of service best meets their needs. One thing that we encounter consistently though, is that we are not able to spend the dollars that the state allocates for service delivery for those individuals' housing, utilities, clothing, rent, etc. That is funded through SSI and SSA. That's capped at $500, so with $500 per person, we have to be able to serve individuals residentially, provide for their clothing needs, their food, electricity, incidentals, personal needs. It is not enough money to serve those folks if we are confined to serving three individuals in any reputable location that we would want to provide that service. That is why we ask that we be allowed to serve more than three individuals just because of the economy of scale.

What I brought along with me is a map provided by the City itself, and I'm not sure that I'm going to be able to let you folks see this through the projector. If each of these circles on here represents a group home (Terry Kathe has told us that this isn't necessarily representative of every group home that is in Lincoln, but there may be other group homes that have been grandfather-claused in, so we are not able to rely necessarily on this when we're looking for housing for individuals who are in need of service. We currently have ten people who have requested services from us and we're not able to provide those services to those folks because we just simply cannot find the housing for those folks, and each one of these circles represents a group home and they can't, under current Lincoln Municipal Code, overlap. And until very recently, we had no way of even requesting an accommodation and so we are appreciative that we now have the opportunity to come before you folks and ask for an accommodation, but we are soon going to run out of space. That's going to be very problematic for the City of Lincoln, most particularly with the de-institutionalization of the regional centers. We as a society need to figure out, what are we going to do with those that are less fortunate than us? Where are we going to house them?

Bills-Strand: Are there any questions:

Carlson: I have two questions that are tied together. First I want to point out just for the record again, one alternate for accommodation would be, which is not shown on the map, which is the large number of three persons or less facilities that are located by right as families. What I am asking you to help me understand is the connection between your inability to provide for them in a three-person or less family facility, which could be located and not need an accommodation from spacing, because of the economic – you touched on it briefly. Just give me some more on that. You say you have ten people who have requested but DSN cannot find housing for them in any reputable location because of lack of their state funds. Can you expand on that a little bit?

LeFevre: Sure. We have to weigh the needs of the people in services against what their economic situation currently is like. We just can't say, we have three people with developmental disabilities – we're going to put those folks together. We have to match up people with similar needs and also people who want to live together. And, in trying to do that, we run into the economic realities of $500/month pays for rent, it pays for food, it pays for transportation, it pays for clothing, it pays for utilities. All of that has to happen for one person for $500 a month, give or take a little bit, depending upon the circumstances. That is quite a juggling act. And so when I talk about the economy of scale, if we are able to serve four or five people where they are able to share the rent, share the cost of living together, we are better able to serve those folks.

Moore: The one thing I would add to that as well when you are looking at it from a legal perspective under the Fair Housing Act, it is quite clear the accommodation request we are requesting is a specific house. Were it our burden to say well, you can find someplace else to live in the City, you could never prove that we need an accommodation. It's looked at from the specific dwelling for which we are asking. I think even looking at what the new Lincoln Municipal Code, Section 1.28.50 says is, that the accommodation request is to make the specific housing available rather than any home in the city. But I think, even when we are talking about all of the homes in the City, as Mr. LeFevre points out, that in order to better serve their clients and be able to serve their clients who have no choice but to live in this setting on such a meager amount of money from the government (we are trying to spend the government's money wisely here), is to provide more than three folks per home.

Esseks: We're talking about a licensed facility.

LeFevre: Yes, when four or more individuals with developmental disabilities live together in one environment, it becomes, under state regulations, a "center for the developmentally disabled", and under the "CDD" regulations, we are required to be licensed by Nebraska Health and Human Services and we are subject to all of the inspections, the regulatory standards, which go above and beyond what is required by Building & Safety to the City of Lincoln.

Esseks: Assumes the licensing means regular supervision.

LeFevre: Currently, all of our centers for the developmentally disabled are staff on a 24-hour basis (when I say 24-hour, I mean while the individuals in services are present). That does not mean that there is staff there when those folks are at work or home or being supervised elsewhere. An important piece to all of this is that many of the individuals with whom we have a relationship don't require 24-hour supervision–they require assistance learning how to budget their money, learning how to use the bus system–those sorts of things, so it's all determined as to the level of service provided to each individual by a team that is chaired by Nebraska Health and Human Services.

Larson: Does this person who supervises – does he or she live in the same residence?

LeFevre: No. We have shift staff.

Larson: I was interested to see that you do separate the different kinds of disabilities. In other words, the people who live in this facility would have the same general sort of disability.

LeFevre: Yes, generally so.

Larson: Now this other house that it is in this half-mile area is not run by your organization?

LeFevre: It is, yes. And it has actually been a group home for 25 years.

There was no testimony in opposition.

Staff questions

Rick Peo, City Law Department: I believe that Mr. Moore gave an excellent overview of the Fair Housing Act amendments and the responsibilities that this body has on what we're looking at today. The Federal law does require that reasonable accommodations be granted. That's an affirmative duty that we have to make. Failure to grant reasonable accommodation is discrimination in and of itself, which is prohibited by federal law. Again, as Mr. Moore stated, it is a two-fold step process. The first step (and that is what DSN has the obligation to present) is the need and necessity for the requested accommodation. If they show that it is needed and necessary, then the burden falls on the city to say it is an undue burden on the city and therefore unreasonable. An undue burden is financial or administrative costs to the city that are excessive. Another option is that it fundamentally alters the purpose behind your zoning ordinance or the spacing requirement. From my perspective on the evidence that the city would have is that we cannot say it is unreasonable. This is the first request we have had for reasonable accommodation. It is not going to fundamentally alter the spacing requirement between group homes city-wide. The individual accommodation is only a separation request form one-half mile to a quarter mile. You are not putting in a group home right next to another group home in the same block or anything like that.

Looking back at the legislative history for the spacing requirement in the city ordinance, that was adopted in 1979 when the city rewrote the zoning code, and the primary purpose at that time was to insure that disabled people were given a fair opportunity to be mingled throughout the community, so part of the spacing requirement and separation was to avoid a clustering or to put people back into an institutional environment again by having them in too close of proximity to other disabled persons and therefore not being able to mingle with a society as a whole. I would not think that the separation reduction in this instance from one-half mile to a quarter mile jeopardizes that purpose behind the spacing requirement.

So I think you really need to focus on the "why" is it necessary that the applicant offered – what is the financial necessity for adding an additional person to this location? Are there people that are needing and desiring to be located at this particular home that have been denied ability to find housing elsewhere in the city? Those are the types of questions you need to be looking at and focusing upon.

The questions that I had raised in my mind: Is there a shortage of housing opportunities for the same type of clientele that DSN wants to serve at this location? Is it therapeutically beneficial for one more disabled person to be added to this facility? I don't know if that has been asked but maybe they can address that issue during rebuttal. I think one of the reasons there was not a staff report recommendation is that the application was filled out – it was a statement in their application that it was financially and therapeutically necessary to add one person. Based on the application, we didn't feel we had sufficient information to make a recommendation based on that application. We would have to kind of wait and see what facts were actually displayed at this hearing.

Carroll: Since they are moving up to four or more people, and the applicant has said he just wants four, can we limit to four?

Peo: I think that's what the accommodation is – to waive the spacing requirement to allow a fourth person. I think that would be the recommendation.

Esseks: There are 11 houses on this circle where the subject house is located. Were the owners of each of those houses informed by mail of this application?

Peo: Yes, they should have been. We have a notice requirement the same as a change of zone and special permit application. It should go to all abutting property owners within 200 feet.

Response by the Applicant

Moore: We did not receive any further request from the City Planning Department for more information than we filed with our application. We certainly would have provided that had they asked. We didn't know that they had lacked any information. As far as the therapeutically beneficial – two responses to that: 1) we've talked about the therapeutic benefit of providing community-based residential treatment. LB 1083 was passed last year by the State Legislature to de-institutionalize treatment for persons such as persons DSN serves, and the reason for that was to provide more community-based residential treatment because that was more beneficial both to the clients with disabilities as well as the community as a whole. Secondly, as Mr. LeFevre pointed out, they serve the relative same types of disabilities in these homes, and when you have three people living in one home and you have another client with the same type of disability that needs that kind of therapeutic benefit, they need to be in

the same treatment facility–the same home–as the other three people. So by adding one person, it is therapeutically beneficial, both to the person who gets that treatment that is similar to the other persons with disabilities rather than that person being shunned away or put in some other treatment plan not with people of similar disabilities, which actually impedes their treatment. Secondly, certainly, to remain financially viable as you heard, the state gives a very limited (it actually comes from SSI) amount of money to each of these consumers, and that money has to be stretched between clothing and housing and rent and all of those other issues. And so it is necessary to remain financially viable that DSN be allowed to add this fourth person to this home, and weighing that against (as the city mentioned) no apparent burden on the city to do this, indeed not changing anything relative to the home for purposes of zoning, that need substantially outweighs obviously a non-existent burden on the part of the city.

Carlson: For either Mr. Moore or Mr. LeFevre, you mentioned approximately 10 people who have requested DSN can't find housing, so potentially one of those persons on those waiting lists is a person who would be looking to – I'm trying to get back to the specifics of the specific site – potentially one of those people is someone that would be looking to locate in this particular facility.

LeFevre: That was exactly what I wanted to address. We're talking about generalities of adding a fourth person, but we're missing the point that we have people who are in our services who want to live at a particular location. They want to live with friends. They want to be near the things that are important to them – their work, their school. So we are not just adding numbers of people. What we are trying to do is accommodate requests from people as best we can with the mix of regulations and licensing and things that we have to go through, but what we try to do is respect the request of individuals when they make a request to live in a specific location. You and I can live anywhere in the city that we want to, but that isn't always the case with some of the folks we serve who have developmental disabilities. Sometimes they are forced to live where we can place them. And we'd like to see that tide turn. We'd like to be able, as much as possible, to accommodate requests for specific locations.

Carlson: Okay, I appreciate that. So back to specific, though, there is potentially someone on your waiting list that wants to locate at this particular facility, and we're looking to accommodate --

LeFevre: Yes, we do tours of locations with family members and people in services, their guardians – they are active participants in choosing where they want to live.

Carroll: I just want to verify that we can fix this at four people for this site.

LeFevre: At this particular location, we wouldn't want over four individuals living there.

ACTION BY PLANNING COMMISSION: July 6, 2005

Larson moved approval, with the limitation of four, seconded by Carroll.

Carlson: The only question I would have is since this is the first one out, what is the proper motion?

Rick Peo: The motion sounded fine. I assume it was a request to recommend approval of the requested accommodation to waive the spacing requirement in order to allow a fourth person to live at this facility. This was accepted and became the main motion.

Bills-Strand: The only comment I would like to make is that it would be helpful as a commissioner if we had either a recommendation from staff, and if you felt you could not do it without enough information, that you made that request of the applicant.

Carlson: I appreciate what the applicant said and their presentation was good and I appreciate that, but reading the letter that they got was a bit general on this. It is much more helpful to hear the specific financials and the specific needs on the specific site.

Motion carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting "yes"; Krieser, Pearson, Sunderman and Taylor absent. This is a recommendation to the City Council.

CHANGE OF ZONE NO. 05040
FROM O-3 OFFICE PARK DISTRICT TO
B-2 PLANNED NEIGHBORHOOD BUSINESS DISTRICT,
and
USE PERMIT NO. 05004
FOR 33,500 SQUARE FEET OF OFFICE AND
COMMERCIAL FLOOR AREA,
ON PROPERTY GENERALLY LOCATED
AT SOUTH 14TH STREET AND YANKEE HILL ROAD.
CONT'D PUBLIC HEARING BEFORE PLANNING COMMISSION: July 6, 2005

Members present: Carroll, Carlson, Esseks, Larson and Bills-Strand; Krieser, Pearson, Sunderman and Taylor absent.

Staff recommendation: Conditional approval.

Ex Parte Communications: None.

The Clerk announced that the applicant has submitted a written request for two-week deferral, with continued public hearing and action scheduled for Wednesday, July 20, 2005, 1:00 p.m.

Carroll moved to so defer, seconded by Carlson and carried 5-0: Carroll, Carlson, Esseks, Larson and Bills-Strand voting 'yes'; Krieser, Pearson, Sunderman and Taylor absent.

There being no further business, the meeting was adjourned at 3:15 p.m.

Please note: These minutes will not be formally approved until the next regular meeting of the Planning Commission on July 20, 2005.

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